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No. 00-214

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

QWEST CORPORATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS, INC., *et al.*,
Respondents.

QWEST CORPORATION,
Petitioner,

v.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., *et al.*,
Respondents.

QWEST CORPORATION,
Petitioner,

v.

SPRINT COMMUNICATIONS CO. L.P., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEFS IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner advises the Court that the Rule 29.6 statement filed with its petition for a writ of certiorari is still complete and accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i
TABLE OF AUTHORITIES iv
INTRODUCTION 1
ARGUMENT 2
CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Page

AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999) 2, 10
Comsat Corp. v. FCC, 114 F.3d 223 (D.C. Cir. 1997) 4
FCC v. ITT World Communications, Inc., 466 U.S. 463 (1984) 4
GTE Service Corp. v. FCC, 205 F.3d 416 (D.C. Cir. 2000) 5, 6
Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997) 4
Iowa Utilities Board v. FCC, 219 F.3d 744 (8th Cir. 2000) 4
Southwestern Bell Telephone Co. v. Arkansas Public Service Commission, 738 F.2d 901 (8th Cir. 1984), *vacated on unrelated grounds*, 476 U.S. 1167 (1986) 3
U S WEST Communications, Inc. v. Hamilton, 224 F.3d 1049 (9th Cir. 2000) 8
U S WEST Communications v. MFS Intelenet, Inc., 193 F.3d 1112 (9th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3669 (U.S. June 29, 2000) 8

STATUTES

28 U.S.C. § 2342 3
28 U.S.C. § 2349(a) 3
47 U.S.C. § 251(c) 5, 6
47 U.S.C. § 251(d) 3
47 U.S.C. § 252(c)(1) 3
47 U.S.C. § 252(e)(6) 7, 9
47 U.S.C. § 261(c) 3

INTRODUCTION

Respondents fundamentally misdescribe what the Ninth Circuit has done in the decision under review. This is not simply a case of co-equal federal courts reaching different results on abstract questions of statutory interpretation, *cf.* WUTC Opp. at 12-14, 17; Sprint Opp. at 11-13; MCI Opp. at 16,[1] or of the invalidation of a preemptive federal rule leaving some vacuum for states to fill as they wish, *cf.* WUTC Opp. at 12, 17. Instead, the Ninth Circuit has asserted the effective power to *nullify* Hobbs Act review in other circuits by authorizing state regulators to continue "implementing" FCC rules that those other circuits have vacated. Whereas the Eighth Circuit held on direct review that the FCC violated the Telecommunications Act of 1996 by requiring incumbent carriers to reconfigure their networks on demand and vacated the FCC's rules imposing this requirement, the Ninth Circuit has upheld a state order imposing the same requirement, *concededly based on no legal authority other than the vacated FCC rules.* And whereas the D.C. Circuit, following this Court, held on direct review that the FCC could not interpret a statutory provision permitting collocation of "necessary" equipment as authorizing the collocation of anything "useful," the Ninth Circuit refused to vacate an identical state order, *even though the court conceded that the order was premised on the FCC's invalidated legal interpretation.*

There is much more at stake in this case than simple interpretive differences. The Ninth Circuit has turned the jurisdictional structure of the Telecommunications Act on its head, dealing a crippling blow to Congress's effort to create a modern national telecommunications policy and vitiating this

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[1] Respondents MCI WorldCom and AT&T filed a joint Brief in Opposition. Petitioner will refer to "MCI" to mean MCI WorldCom and AT&T together.

Court's fundamental premise in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). The Ninth Circuit freed the states from "hew[ing]" to federal law as articulated by the FCC and construed by the Hobbs Act courts. 525 U.S. at 378 n.6. To make matters worse, it granted state regulators the power to create new regulatory obligations *out of whole cloth* and give them the full force of federal law, just as long as they do not violate any express prohibition of Congress. Even the FCC, the agency with primary jurisdiction under the Communications Act, has not been delegated such plenary authority. By purporting to authorize state regulators to follow or disregard FCC rules as they see fit — and even to resurrect *vacated* rules in disregard of the federal courts — the Ninth Circuit has set the balkanization of federal telecommunications policy in motion: one federal law now applies in the 41 states outside the Ninth Circuit, while up to 9 different versions of "federal" law can apply in the states of that Circuit. In fact, as U S WEST explains below, this disintegration has already begun.

ARGUMENT

1. Respondents' basic approach is to obscure what the WUTC and the Ninth Circuit have actually done in this case. While respondents speculate about what other provisions of the Act or state law the WUTC *might have* relied on for its arbitral orders, *see* WUTC Opp. at 16; MCI Opp. at 18, the record is clear that the only sources of legal authority on which the WUTC *in fact* based its orders were the vacated FCC rules. *See* Pet. at 8-9; Pet. App. at 28a-29a, 89a-90a. Even respondent Sprint concedes that "[t]he WUTC relied on implementing regulations promulgated by the [FCC] in ordering these agreement provisions." Sprint Opp. at 1.[2]

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[2] Moreover, the suggestion that the WUTC could have relied on state law to impose regulatory requirements that are not authorized by the Telecommunications Act is simply wrong. The various savings clauses respondents cite preserve state rules *only* to the extent they are "not

When the Eighth and D.C. Circuits invalidated these rules on direct Hobbs Act review, the *only* legal bases for the WUTC's orders disappeared.

The Ninth Circuit nevertheless felt free to ignore the decisions of these other circuits invalidating the FCC's rules (and authorized state regulators to do the same), at least in part because it believed those decisions to be "incorrect." Pet. App. at 9a. This was a violation of the Hobbs Act, pure and simple. The Hobbs Act vested these other courts with exclusive jurisdiction, not just to "enjoin[], set[] aside, or suspend[]" the FCC rules in question — to use MCI's misleading truncation of 28 U.S.C. § 2349(a), *see* MCI Opp. at 15-16 — but also to render any judgment "determining the validity" of those rules. 28 U.S.C. § 2349(a); *see also id.* § 2342. The Ninth Circuit was not at liberty to decide that the Eighth Circuit had gone about "determining the validity" of the combination rules incorrectly. Moreover, there is no difference in practice between doing what the Ninth Circuit did and formally reinstating the vacated rules: The FCC's rules were never self-executing, but rather depended on enforcement through the state commissions' interconnection arbitrations under 47 U.S.C. § 252. *See* 47 U.S.C. § 252(c)(1). By authorizing states to continue enforcing these regulatory duties in arbitrations, the Ninth Circuit has resurrected the FCC's vacated rules in every practical respect, even if the rules themselves remain off the books. *See Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 906 (8th Cir. 1984) (Hobbs Act bar applies wherever "practical effect . . . involves a

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inconsistent" with the federal Act or the FCC rules implementing it (as authoritatively construed by a Hobbs Act court). *See, e.g.*, 47 U.S.C. §§ 251(d)(1), 251(d)(3)(B), 261(c). The Eighth and D.C. Circuits ruled that the element combination and collocation requirements at issue *violated the plain language of the Telecommunications Act*; hence, any state law imposing the same requirements would be inconsistent with the Act and thus preempted.

determination of [a rule's] validity"), *vacated on unrelated grounds*, 476 U.S. 1167 (1986); *accord*, *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) (Hobbs Act applied because judicial issue was equivalent "[i]n substance" to a redetermination of agency decision's validity).

Respondents instead claim that the Eighth and D.C. Circuits' decisions vacating the combination and collocation rules merely left an *absence* of FCC regulation that the WUTC was free to fill however it chose. *See, e.g.*, WUTC Opp. at 12, 17. But that just begs the question of where the WUTC gets the authority to impose any requirement in the first place. As noted above, the WUTC claimed no source of authority to issue its orders other than the FCC rules it was implementing. Respondents' suggestion that the WUTC possesses some kind of generic "plenary" authority under the 1996 Act to create new federal regulatory requirements (*see* Sprint Opp. at 19) is patently absurd: even the *FCC* does not "possess[] *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area." *Comsat Corp. v. FCC*, 114 F.3d 223, 227 (D.C. Cir. 1997) (internal quotation marks omitted).

Moreover, respondents mischaracterize the Eighth and D.C. Circuits' decisions. The Eighth Circuit did not simply hold, as the WUTC suggests, "that the 1996 Act does not require an incumbent to combine elements at the request of a competitor" (WUTC Opp. at 14); rather, it held that such a regulatory requirement in fact affirmatively *violates* the plain language of the Act. *See Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 759 (8th Cir. 2000) ("*Iowa Utilities Board II*") ("subsections (c)-(f) violate the plain language of the statute"); *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) ("the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements

themselves").[3] Similarly, the D.C. Circuit did not simply say that the FCC's definition of necessary should be "better expla[ined]" (MCI Opp. at 21); instead, it held that a rule interpreting 47 U.S.C. § 251(c)(6) to permit the collocation of merely "used or useful" equipment "goes too far and thus 'diverges from any realistic meaning of the statute.'" *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 424 (D.C. Cir. 2000) (citation omitted). The Eighth and D.C. Circuit decisions did not simply create a void, nor did their decisions merely negate FCC authority while leaving other agencies free to act. Instead, these courts held that rules requiring incumbents to reconfigure their networks for competitors and to open their central offices to equipment that is simply "useful" to rivals *violate the Act*.

2. The Ninth Circuit thus should not have second-guessed the Eighth Circuit or decided the merits of the combination rules at all. But its ruling stands in irreconcilable conflict with the Eighth Circuit's decision in *Iowa Utilities Board II*, as even Sprint, MCI, and AT&T concede. *See* Sprint Opp. at 13-14; MCI Opp. at 3 n.6, 18-19 (joined by AT&T). MCI and AT&T themselves suggest that certiorari is necessary to resolve this conflict; hence, they have both petitioned for certiorari in *Iowa Utilities Board II*. *See WorldCom, Inc. v. Verizon Communications, Inc., petition for cert. filed*, No. 00-555 (U.S. Oct. 10, 2000); *AT&T Corp. v. Iowa Utils. Bd., petition for cert. filed*, No. 00-590 (U.S. Oct. 13, 2000).

Respondents suggest that the Court should use *Iowa Utilities Board II* to correct this conflict rather than the decision under review. But the Ninth Circuit's erroneous and boundless expansion of the state commissions' regulatory authority is presented and can be corrected only in this case.

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[3] Indeed, the WUTC acknowledges this elsewhere in its Brief in Opposition. *See* WUTC Opp. at 7 ("the Eighth Circuit decided that the mandatory combination rule *violates the Act*") (emphasis added).

Absent a grant of certiorari here, the Ninth Circuit will continue to allow state regulators to impose whatever regulatory requirements they choose in the name of federal law, without regard to whether the Act contains any affirmative authorization for such requirements. Moreover, if the Court fails to grant certiorari in this case, its rulings in any future case will be for naught. The Ninth Circuit has already made clear that a determination that the FCC's combination rules should remain vacated would not preclude state commissions in the Ninth Circuit from resurrecting the identical requirement. Even if the Court were to grant certiorari in *Iowa Utilities Board II*, it would also have to grant certiorari in this case to bring state regulators within the Ninth Circuit "to heel."

3. The decision under review likewise creates a clear circuit split on the meaning of 47 U.S.C. § 251(c)(6), which directs incumbent carriers to open their premises to competitors' equipment that is "necessary" for interconnection. The Ninth Circuit held that an order requiring an incumbent to collocate equipment that is merely "used or useful" for interconnection does not violate section 251(c)(6) or any other provision of the 1996 Act. *See* Pet. App. at 11a ("Although the Act may not require the provision, it certainly does not proscribe it."). The D.C. Circuit held just the opposite, ruling that a collocation requirement extending to equipment that is merely "used or useful" "goes too far and thus 'diverges from any realistic meaning of the statute.'" *GTE Serv. Corp.*, 205 F.3d at 424 (citation omitted).[4] The conflict between the two circuits could not be more plain.

Respondents attempt to distract the Court from this split by suggesting that the particular piece of equipment the

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[4] The D.C. Circuit ruled that "necessary" in 47 U.S.C. § 251(c)(6) must mean "required" or "indispensable," not merely "useful." *See* 205 F.3d at 422-24.

WUTC was considering (a "remote switching unit" or "RSU") might still meet the D.C. Circuit's stricter (and correct) standard of "necessity." Regardless of whether this may be true (and U S WEST avers it is not), this purely factual question cannot be determined for the first time on a petition for certiorari. The WUTC's post-hoc suggestion (WUTC Opp. at 19-20) that it in fact based its RSU decision on a number of factors that collectively added up to the proper legal standard is pure fiction: as the record makes plain, *see* Pet. App. 89a-90a, and as even the Ninth Circuit conceded, *see id.* at 10a, the WUTC unambiguously grounded its order on a "used or useful" collocation standard. Sprint's suggestion (Sprint Opp. at 16) that the *Ninth Circuit* made such findings about RSUs based "on an independent interpretation of [the Act] and the evidence presented in the parties' individual arbitrations" is an even greater stretch — one belied by the Ninth Circuit's cursory opinion and express *disclaimer* of any authority to review the WUTC's decisionmaking process. Pet App. at 10a-11a. Finally, MCI's speculation (MCI Opp. at 19-20) that the FCC might find, on remand from the D.C. Circuit, that RSUs do meet some stricter standard of "necessity" is simply irrelevant. Whatever the FCC may or may not say with regard to RSUs, the Ninth Circuit has still freed state commissions in its jurisdiction to order the collocation of *any* equipment that is merely "useful" to competitors, and there is nothing the FCC can do to bring these regulators back to the proper statutory standard.

4. The Court should not underestimate the practical effect of the Ninth Circuit's unlawfully deferential standard of review. By ruling that federal courts reviewing state orders under 47 U.S.C. § 252(e)(6) may only consider whether the state regulator has violated some express congressional prohibition, instead of asking whether the order has any basis in the Act, the Ninth Circuit has turned Congress's legislation into a license for state regulators to wield federal authority however they see fit. Moreover, by

treating the state regulatory decisionmaking process as an unreviewable "black box" even where, as here, the court *concedes* that the state regulator misapplied federal law, the Ninth Circuit disables the only check available to ensure that states do not apply federal law in a totally arbitrary fashion. Indeed, under the Ninth Circuit's standard of review, the WUTC could have divined U S WEST's obligations under the Act by flipping a coin or examining a sheep's liver, just as long as Congress had not expressly proscribed the end result.

The last time this problem arose, MCI assured the Court that "there is no reason to think [this issue] will ever arise again."[5] But the Ninth Circuit has now upheld at least five different state orders resurrecting different vacated FCC rules.[6] With each new instance of state regulators' defiance, MCI's repeated assertions that this problem is "idiosyncratic" or "rare" ring more and more hollow. *See* MCI Opp. at 17. In addition, respondents cite other courts that appear to have followed the Ninth Circuit's lead. *See* WUTC Opp. at 15; MCI Opp. at 24; Sprint Opp. at 14 n.7. The dam has clearly broken.

MCI's assurances that these cases will be "rare" are further undermined by its co-respondents. Sprint acknowledges that many FCC rules remain in various stages of rulemaking and Hobbs Act review in circuit courts around

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[5] Brief in Opposition at 14-15, *U S WEST Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3669 (U.S. June 29, 2000) (No. 99-1641).

[6] In addition to the three cases consolidated in US WEST's Petition, the Ninth Circuit upheld the same combination requirement in *MFS Intelenet*, 193 F.3d at 1121, and most recently upheld the same collocation requirement imposed by the Oregon Public Utility Commission in *U S WEST Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1056 (9th Cir. 2000) (upholding collocation requirement based solely on *MCI* decision below, with no analysis of state commission's basis for imposing requirement specifically in that case).

the country and in this Court. *See* Sprint Opp. at 20-21. At the same time, state commissions all over the country continue to arbitrate and approve interconnection agreements, and federal courts continue to review the commissions' actions under section 252(e)(6). Therefore, similar collisions between section 252(e)(6) courts and Hobbs Act courts are certain to arise on a regular basis.

Respondents suggest that such collisions will not be problematic, since there is no real need for uniformity in federal telecommunications policy. The WUTC, for example, actually says that Congress *never* intended that the law would be applied uniformly, since it provided for district court review of state regulators' decisions. *See* WUTC Opp. at 13-14, 24. But in another case, respondents have argued that it is absolutely essential that the Act be applied uniformly across the country. Respondent AT&T told this Court in a petition for certiorari in another case, filed just three days after its response here, that "Congress contemplated that competitive entry into local telecommunications markets would be governed by 'the new *federal* regime . . . to be guided by federal-agency regulations'" and that divergent interpretations of the Act "destroy[] the national uniformity that Congress sought to establish on the competitive rules of engagement."[7] And most important, this Court has already held that the Act establishes a unitary federal policy on the subjects it governs:

> [T]he question in this case is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. . . . [T]here is no doubt . . . that if the

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[7] Petition for a Writ of Certiorari at 27-28, *AT&T Corp. v. Iowa Utils. Bd., petition for cert. filed*, No. 00-590 (U.S. Oct. 13, 2000) (omission in original) (citation omitted).

> federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel.

Iowa Utils. Bd., 525 U.S. at 378 n.6. The Court should grant certiorari in this case to bring the Ninth Circuit, and state regulators within its territory, back into line with the national telecommunications policy that governs the rest of the country.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should grant the petition, vacate the judgment below, and remand the case to the Ninth Circuit with instructions to follow the decisions of the Eighth and D.C. Circuits.

Respectfully submitted,

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